#### State of Oregon

Department of Environmental Quality Memorandum

**Date:** April 25, 2012

**To:** Environmental Quality Commission

**From:** Dick Pedersen, Director

**Subject:** Agenda item xx, Rulemaking: Water Quality Certification Procedures for Klamath River Restoration Project

April 26, 2012 EQC meeting

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| **Why this is important** | Existing rules are not clear about how DEQ would evaluate a dam removal project should DEQ need to certify whether the project will comply with water quality standards. |
| **DEQ recommendation and EQC motion** | DEQ recommends that the EQC adopt the proposed Klamath-specific rule clarifying DEQ’s 401 certification procedures for a potential dam removal project, as shown in Appendix A. |
| **Background and need for rulemaking** | The U.S. Secretary of Interior will determine whether four dams on the Klamath River should be removed, one of which, the J.C. Boyle dam, is in Oregon. If the J.C. Boyle dam is removed under a federal license or permit, the dam removal entity will be required to apply for a water quality certification from DEQ under Section 401 of the federal Clean Water Act.  If the Secretary of Interior decides that the J.C. Boyle dam should be removed, the state of Oregon will be asked to concur with that decision. DEQ counsel recommends that a clear state regulatory pathway for future state permitting and 401certification is important to the state’s determining whether to concur with a removal decision. The initial timing of this rulemaking was based on the expectation that the Interior determination and request for state concurrence would occur in spring 2012. The Secretarial decision has since been delayed until related congressional action.  The proposed rule is needed to clarify DEQ’s policy and procedures for evaluating whether to certify that the removal of J.C. Boyle dam will comply with water quality standards for the Klamath River. DEQ’s current certification rules do not specify how DEQ would evaluate a project like dam removal, which, when it occurs, will cause some short term water quality impacts but may result in long term water quality and fish protection benefits.  See the issue paper provided in attachment D for additional information. |
| **Effect of rule** | The proposed rule clarifies DEQ’s authority and intent to allow a time schedule for the dam removal project to comply with water quality standards if DEQ makes the findings specified in the rule. The purpose of the time schedule is to provide time for recovery of short term water quality impacts associated with dam removal activities at the J.C. Boyle Dam. The proposed rule requires that DEQ conclude, based on information provided by the applicant, DEQ’s evaluation, and public comment, that dam removal activities will not cause an exceedance of a water quality standard beyond the period for meeting standards specified in the time schedule. The time schedule would be included in the water quality certification.  Conditions would be placed in the certification to protect water quality to the maximum extent practicable during the dam removal and to ensure that the expected long term water quality and fish habitat improvements outweigh the short term water quality impacts.  DEQ will only use this rule if the Secretary of the Interior decides that the J.C. Boyle Dam should be removed pursuant to the Klamath Hydroelectric Settlement Agreement (KHSA) and a dam removal entity applies for certification.  The proposed rule will benefit state and federal agencies by clarifying regulatory procedures. It is not anticipated that small businesses or local communities will be affected by the proposed rule. This rule is separate from the federal government’s decision whether the dam should be removed and does not affect that decision.  See the issue paper provided in attachment D for additional information. |
| **Commission authority** | The commission has the authority to take this action under ORS 468.020, 468B.030, 468B.035 & 468B.048 |
| **Key issues** | The primary issue in developing this rule was to determine the regulatory mechanism by which DEQ could determine whether to certify a dam removal project that may cause some short term water quality impacts. DEQ and the stakeholders DEQ consulted agree that there should be a regulatory pathway to allow the project to proceed if DEQ concludes that the long term water quality benefits will outweigh any short term impacts. Through discussions with our legal counsel, other states and EPA, DEQ determined that it can legally provide a time schedule in the certification by which water quality standards must be met. DEQ finds this is the best approach for this type of restoration project, where the water quality impacts are not from an NPDES-permitted point source. The proposed rule clarifies DEQ’s authority and intent to use a time schedule should a certification for the Klamath dam removal be requested and should DEQ decide it will grant the certification based on the findings specified in the rule.  The advisory committee discussed several issues relevant to the KHSA, future decisions regarding the removal of the dam and DEQ’s Section 401 certification process. DEQ and the advisory committee considered the following issues in considering options and developing the proposed rule:   1. The Section 401 application, based on a detailed plan for removal with specific mitigation measures, will be submitted only after a decision has been made to remove the J.C. Boyle Dam. 2. Technical issues regarding detailed plans to minimize or mitigate water quality impacts will have to be evaluated during the Section 401 certification process. Detailed scientific information will not be available until this stage of the process. This rule specifies the findings that DEQ must make at the time of Section 401 certification. 3. Committee members agreed with the DEQ’s stated objective to allow short term impacts in order to facilitate restoration if DEQ can make a finding that the project will achieve long term river improvements that outweigh the short term impacts. 4. Committee members generally agreed with the objective of minimizing water quality impacts during the dam removal process to the maximum extent practical. 5. The KHSA, which includes provisions for the potential removal of the J.C. Boyle Dam, is a contentious issue in the Klamath Basin. 6. This rulemaking will facilitate the administrative process related to DEQ’s interactions with the Dam Removal Entity. The DRE is the designated entity with the responsibility to remove the dams. The DRE has not been selected yet. 7. The governor supports the KHSA and may need to rely on this rule to support the state’s concurrence. 8. DEQ is not responsible for deciding whether or not to remove the dams. Rather, DEQ’s rule is focused on how to protect water quality to the extent feasible through the Section 401 certification process and to ensure that short term water quality impacts do not present an obstacle to dam removal, if the US Dept. of Interior decides JC Boyle should be removed. |
| **Public outreach** | DEQ assembled a local advisory committee that included federal and state agencies, an environmental group, a fishing association and a county commissioner. The committee provided input on the options evaluated, the issue paper, the proposed rule and the fiscal and economic impact statement. See the issue paper provided in attachment C for additional information.  DEQ accepted public comment for 45 days and held a public hearing in Klamath Falls. Two people attended the hearing and five people submitted public comment. Please see the summary of public comment and agency responses in attachment B. |
| **Next steps** | If the proposed rule amendment is adopted by the EQC, DEQ will file the rule with the Oregon Secretary of State. Because EPA approval is not required, the rule will be effective as of the SOS filing date. |
| **Attachments** | Proposed rules (redline)  Public comment and agency responses  Hearing Officer’s report  Issue Paper: Water Quality Certification Procedures for Klamath River Restoration Project |
|  | Relationship to Federal Requirements questions  Statement of Need and Fiscal and Economic Impact  Land use evaluation statement |

Approved:

Division: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

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